UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION

FIVE STAR MANUFACTURING INC.

Employer

and Case 17-RC-12237

TEAMSTERS LOCAL UNION NO. 245, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S REPORT ON OBJECTIONS WITH FINDINGS AND RECOMMENDATIONS

Following the filing of the petition herein on December 3, 2003, and pursuant to a Stipulated Election Agreement approved by the Acting Regional Director on January 6, 2004, an election by secret ballot was conducted on February 11, 2004, in the agreed-upon appropriate unit.[1] The tally of ballots, a copy of which was made available to the parties upon the conclusion of the election, shows that there were approximately 23 eligible voters, 12 of whom cast ballots for, and 9 of whom cast ballots against, the Petitioner. There were 2 challenged ballots and no void ballots. Thus, the challenged ballots were not determinative of the outcome of the election.

[1] All full-time and regular part-time production employees including Welders, Fabricators, Shipping and Wash employees employed by the Employer at its facility located at 104 Industrial Drive, Crain, Missouri but EXCLUDING, office clerical employees, guards, managerial and supervisors as defined by the Act and all other employees.

Thereafter, on February 17, 2004, the Employer timely filed objections to the election (a copy of the Employer's objections is attached to this report as Exhibit 1).

Pursuant to paragraph 7 of the Stipulation, and in conformity with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned, after reasonable notice to all parties to present relevant evidence, has completed the investigation of the objections and hereby reports as follows:

Objection 1

The Employer's first objection alleges, in substance, that Randy Looney, Charles (Rick) R. Looney, Brenda Smith and Truman Zinn are supervisors who attended meetings held for the purpose of soliciting support for the Union and thereby prejudiced the results of the election. In support of this objection, the Employer relies on the testimony provided by these individuals in the investigation of the unfair labor practices charges filed against the Petitioner in Case 17-CB-5896. The Employer also presented testimony addressing the supervisor status of Randy Looney, Charles R. Looney, and Brenda Smith in the prior case. In the investigation of 17-CB-5896 the above named individuals testified, as follows, regarding their attendance at employee meetings:

Randy Looney testified that a few weeks prior to December 22, 2003, he was asked to attend an employee meeting to discuss the Union, but chose not to attend. Truman Zinn testified that he attended a union meeting held at the home of a fellow employee where he saw another supervisor present. Zinn refused to identify the supervisor but stated that he did not hear this individual speak at the meeting. Zinn testified that while at the meeting, he informed the employees that he had attended the meeting to let them know that he had the courage to attend

the meeting. He also noted that he had initially decided not to attend because he had not been informed of the Union's organizational interest or the meeting until the last minute.

Rick Looney testified that during the same time period, he also attended a meeting held to discuss the Union. The meeting was held at the home of one of the employees but no union officials were in attendance. Looney testified that he did not speak to the 12 to 15 employees that were in attendance at the meeting about the Union. Rather, he only listened to what was being said. He was given a Union authorization card for signature. No one asked him to and he did not talk to the employees about the Union. While he did see Brenda Smith, another alleged supervisor at the above meeting, he did not hear her say or see her do anything to express support for the Union's organizational efforts. Brenda Smith was not proffered as a witness in Case 17-CB-5896 or for these objections.

It would appear, even assuming arguendo the supervisory status of the above-mentioned individuals, that their actions in merely attending the Union organizational meetings are not objectionable, particularly where their actions in revealing support of the Union's efforts do not evidence potential reprisal, punishment or intimidation against any bargaining unit employee. Millsboro Nursing & Rehabilitation Center, Inc., 327 NLRB 879 (1999). Nothing revealed by the investigation suggests that any of these individuals engaged in pro union supervisory activities that would have prevented employees from fairly expressing their preference in the subsequent election. Accordingly, it is recommended that Employer Objection 1 be overruled.

Objection 2

In its second objection, the Employer alleges that one or more of the voters were terminated immediately following the election. The Employer asserts that the employees either voluntary terminated themselves or were terminated by the Employer for cause. The Employer

admits that it failed to terminate any of the disputed employees until after the election. The Employer maintains that the vote may have ended up being a tie vote if those persons were not included.

This issue was not raised during the investigation of 17-CB-5896 and no additional evidence or testimony was offered in support of this objection. Regarding the Employer's argument that employees engaged in conduct for which the Employer could have legitimately terminated them, no evidence was submitted establishing that any employee was notified of such conduct or told they would be disciplined prior to voting. As the objecting party, the Employer has the sole burden of providing evidence in support of its objections. Section 102.69(a) of the Board's Rules and Regulations, NLRB Casehandling Manual Representation Proceedings, (Part Two), Section 11392. 10. The Employer may satisfy this burden by specifically identifying witnesses who would provide direct, rather than hearsay, testimony to support its objections, specifying which witnesses would address which objections. NLRB Casehandling Manual Representation Proceedings, (Part Two), Section 11392.6; Health Care and Retirement Corporation, d/b/a Heartland of Martinsburg, 313 NLRB 655 (1994); Holladay Corp., 266 NLRB 621 (1983). The Employer also may satisfy this burden by providing specific affidavit testimony and other specific evidence in support of its objections. River Walk Manor, Inc., 269 NLRB 831 (1984). This evidence or description of evidence must be provided to the Regional Office "within 7 days of the day the objections are required to be filed or within such additional time as may have, upon a timely request, been allowed by the Regional Director." NLRB Casehandling Manual Representation Proceedings, (Part Two), Section 11392.6. Also see Seven-Up/Royal Crown Bottling Companies Of Southern California, Inc ., 323 NLRB 579 (1997). In the instant matter, the Employer failed to identify witnesses in support of this objection in addition to the

evidence earlier submitted during the investigation of 17-CB-5896, choosing to rely solely upon the evidence submitted during the investigation of this charge to support its objections.

Additionally, the Board has held that an employee employed on the date of the election is eligible to vote despite any intention to quit after the election. Choc-ola Bottlers, Inc., 192 NLRB 247 (1971). Since the Employer admits in its objection that all employees who voted in the February 11 election were employed by the Employer on the day of the election, it appears that the termination of their employment after the election would not affect their eligibility or otherwise be considered objectionable conduct. Accordingly, it is recommended that Employer Objection 2 be overruled.

Objection 3

It appears that in its third objection the Employer requests that, in the event that the Office of Appeals sustains its appeal in Case 17-CB-5896 and orders that a complaint issue, that the objections be consolidated and litigated with such complaint. The Office of Appeals denied the Employer's appeal in Case 17-CB-5896 on February 26, 2004. See Exhibit 2. Since the Office of Appeals did not sustain the appeal, the objection is now moot. Accordingly, it is recommended that Employer Objection 3 be overruled.

Objection 4

In its fourth objection, the Employer again relies upon evidence submitted in Case 17-CB-5896. In Case 17-CB-5896, the Employer alleged that statements made by agents of the Union indicated that the Union might cause any employee who did not join it and support its activities to lose his or her job. The Employer also asserted that the statements indicated that

employees who failed to support the union would pay higher fees and fines or assessments, if the Union were to win the election**.** In Objection 4, the Employer argues that even assuming no agency status on behalf of the Union, the election should be set aside since the same statements would constitute objectionable conduct pursuant to the Board's "third party" analysis since the conduct of employees adversely affected the outcome of the election and deprived the voters of a free choice.

In Case 17-CB-5896, the Employer specifically alleged that the Union violated Section 8(b) (1)(A) and (2) through its agents by soliciting authorization cards from employees in a coercive and threatening way and causing or attempting to cause supervisors to discriminate against employees who failed to sign such cards or make it appear that the supervisor are cooperating with the labor organization to cause or allow such discrimination to occur.

In support of this allegation the Employer proffered the testimony of Randy Looney, Rick Looney, Truman Zinn, and Aaron Busby**.** Randy Looney testified that about two weeks prior to December 22, 2003, he signed an authorization card that was given to him by another employee. He did not solicit any employees to sign authorization cards on behalf of the Union, nor was he involved with the Union's organizing campaign. Rick Looney testified that during this same time period, he attended a Union organizational meeting held at the home of a fellow employee. He did not speak on behalf of the Union at the meeting or ask any employees to sign an authorization card. Busby testified that during the same time period, he was approached by a couple of employees three or four days in a row and told that another employee was trying to bring in the Union and that this employee wished to speak with Busby about the Union. According to Busby, employee Rick Wurtz later told him that everybody was for the Union. He said that if a person did not sign a card and the union was voted in, that person might not have a

job. Zinn testified that during this same time period, he was approached by several employees and told that this would be a union shop, and that he would either join them or get another job. The employees did not tell him that they were acting or speaking on behalf of the Union and no evidence was offered to suggest that they were conveying anything other than their opinions on these matters.

While the Employer argues that the above mentioned statements and conduct evidences "third party" interference, the Employer has submitted no evidence that any statements were made or actions taken to reveal that the Union bestowed upon any of these employees the right to speak on their behalf. Further, no evidence was submitted establishing that the affected employees had a reasonable basis to conclude that any of the union supporters were capable of carrying out any of the alleged threats. It is also noted that all of the alleged misconduct occurred over a month prior to the election and was not accompanied by any acts of violence against either persons or property. Third-party threats rise to the level of objectionable conduct only where they are "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." See Westwood Horizons Hotel, 270 NLRB 802 at page 803 (1984). Further, no evidence was submitted establishing that any of the statements made to Zinn or Busby were disseminated to any additional bargaining-unit employees. Nor was evidence submitted showing that the "threats" were "rejuvenated" at or near the time of the election. It thus appears that the alleged statements and conduct, viewed either individually or cumulatively, are insufficient to show that they created a general atmosphere of fear and reprisal rendering a free choice in the election impossible.

Additionally, regarding Busby being told that if the union was voted in, he might not have a job, the Board has held generally that threats of job loss for not supporting the union,

made by one rank-and-file employee to another, are not objectionable, as they can be readily evaluated by employees as being beyond the control of the employees and the union. Duralam, Inc., 284 NLRB 1419 fn. 2 (1987).

Accordingly, it is recommended that Employer Objection 4 be overruled.

Objection 5

In its fifth objection, the Employer alleges that since the filing and investigation of Case 17-CB-5896, the Union through its officers and agents, has ratified, confirmed and approved all of the statements discussed above. The Employer argues that this conduct established agency status and requests that the Regional Office reopen the investigation in 17-CB-5896 and find that the conduct violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

On February 17, 2004, the Regional Director notified the Employer, by certified letter, that under Board policy and well-established case law, the burden was on it, as the objecting party, to furnish evidence showing a prima facie case in support its objections. Accordingly, the Employer was notified that unless the information was given within 14 days from the preparation of the Tally of Ballots, the objections would be overruled.

No evidence in support of this objection was submitted. Additionally, the Board has long held that parties filing objections must present specific and timely evidence in support of their objections. Seven-Up/Royal Crown Bottling Companies Of Southern California, Inc., 323 NLRB 579 (1997); Operator Services West, 300 NLRB 473 (1990); Public Storage, 295 NLRB 1034 (1989); Star Video Entertainment L. P., 290 NLRB 1010 (1988); National Labor Relations Board Casehandling Manual Representation Proceedings, (Part Two) Sections 11392.5; Section 102.69(a) of the Board's Rules and Regulations. Accordingly, since the Employer relied solely

upon the evidence submitted in support of the unfair labor practice charge to support its election objections in this matter and no further evidence was timely submitted in support of this objection, it is recommended that Objection 5 be overruled.

Recommendation

IT IS RECOMMENDED that the Board overrule the Employer's objections in their entirety.

IT IS FURTHER RECOMMENDED that, since a majority of the valid votes counted were cast for the Petitioner, the Board issue a Certification of Representative of Election for the February 11, 2004, election which certifies that a majority of the ballots cast plus challenged ballots has been cast for the Petitioner as the exclusive collective-bargaining representative of the employees in the bargaining unit described herein. [2]

Dated: April 1, 2004

D. Michael McConnell, Regional Director
National Labor Relations Board
Seventeenth Region
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Overland Park, Kansas 66212-4677

[2] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by April 15, 2004.

Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, to which a party has timely submitted to the Regional Director in support of its objections or challenges and which are not included in the Report, are not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.